United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-2089

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 75-2089

JAMES L. COBBS,

Petitioner-Appellant,

v.

CARL ROBINSON, Warden, Connecticut State Prison,

Respondent-Appellee.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, DISMISSING PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE RESPONDENT-APPELLEE

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2

TABLE OF CONTENTS

CASES CITED

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BRIEF FOR THE RESPONDENT-APPELLEE

Questions Presented

1. Does an accused have a constitutional right to representation by counsel at grand jury proceedings or a constitutional right that proceedings before a grand jury must be stenographically recorded?

2. Was the grand jury which indicted the defendant illegally or unconstitutionally assembled?

3. Was the petit jury panel from which the defendant's trial jury was selected illegally or unconstitutionally assembled?

4. Were statements made by the defendant improperly admitted into evidence?

Statement of the Case

I

This is an appeal from a judgment of the United States District Court for the District of Connecticut, denying a petition for a writ of habeas corpus. A concise statement of the facts of this case follows:

On the evening of Saturday, August 27, 1966, the petitioner, James L. Cobbs, participated in the murder of one Batista Carbone, a resident of the City of Bridgeport.

Batista Carbone, age 70, resided alone in a fifth floor apartment of the Green Apartments, a public housing project in Bridgeport.

On the evening of Saturday, August 27, 1966, the petitioner was present with an unidentified companion in a local Bridgeport restaurant known both by the name of L. Belle Bar or Tony's Restaurant situated on Harral Avenue across the street from the Green Apartments. The petitioner and his companion left the restaurant and were seen together approximately one-half hour later by the steps leading from the Green Apartments. At that time the petitioner proceeded to walk across Harral Avenue carrying a towel which appeared to have stains which resembled blood on it. On Harral Avenue, the petitioner met and spoke with two friends of his who were named Robert Womble and Raeford Willis. The petitioner told Robert Womble that he had participated in killing someone. The petitioner asked Raeford Willis for a ride. Robert Womble did not want Raeford Willis to take the

petitioner because of what the petitioner had told him. Womble, Willis and the petitioner all drove off in Willis' automobile but Womble left the auto after several blocks because he did not wish to involve himself further.

Shortly thereafter Willis stopped the auto at the petitioner's request and the petitioner placed the same towel with apparent blood stains and a kitchen knife with a wooden handle into a street sewer. Willis then drove the petitioner to the vicinity of the petitioner's home.

The body of Batista Carbone was found on the living room floor of his apartment on Sunday, August 28, 1966. Mr. Carbone had been strangled manually and had been stabbed eleven times by a sharp bladed instrument. The probable cause of death was strangulation with the stab wounds being inflicted after death.

Sometime later petitioner showed Raeford Willis a newspaper article about the death of Batista Carbone and said something about it being true.

Shortly after the Carbone murder the petitioner sold a Timex wrist watch to a man who worked with him at a dry cleaning company. The daughter of Batista Carbone positively identified the same watch as one which had been owned by her father. Mr. Carbone's daughter based her positive identification upon a distinctive yellow stain or discoloration on the watch crystal.

On May 16, 1967 the petitioner was arrested for the Carbone murder. At the time of his arrest and before being taken to the Bridgeport police station the petitioner was advised of specific constitutional rights regarding statements which he might make. Thereafter at the police station these same constitutional rights were reviewed with him again and he signed a written acknowledgment that he was acquainted with them.

At the police station the arresting officer by the name of Lieutenant Anthony Fabrizi advised the petitioner that

the police had all the evidence that they needed regarding the Carbone murder and that he did not want the petitioner to tell them anything. Lieutenant Fabrizi further advised the petitioner that the Bridgeport Police were satisfied that the petitioner had been in the apartment when the man was killed and that he had drank beer taken from the victim's refrigerator and had wiped the refrigerator clean of fingerprints with a towel. At that time the petitioner asked Lieutenant Fabrizi how he knew so much and the lieutenant stated that the man who had been with the petitioner had told them everything and the lieutenant again described wiping fingerprints off of the refrigerator, to which the petitioner stated that he had not done that but the other man did.

Lieutenant Fabrizi then wrote on a piece of paper and placed it under a telephone telling the petitioner that he had written the name of the brand of beer which they had drank in the dead man's apartment and asked the petitioner to test him on it. The petitioner stated "Schaefer beer" and then picked up the paper which had this same brand name on it. The petitioner then stated that he had hit the man in the face and knocked him out; grabbed him to keep him from falling and hurting himself; lowered him to the floor; and went through his pockets.

The petitioner's initial conversation terminated at approximately 10:00 A.M. and the petitioner was processed through normal police booking procedures, while the lieutenant attended to other detective bureau matters. At approximately 11:30 A.M. the petitioner asked for a telephone to call his grandmother. At the same time he stated: "I should call my lawyer."

At that time [illegible]ieutenant placed a telephone in front of the petitioner and advised him that he could make as many telephone calls as he wanted. The petitioner in fact called his grandmother and asked her to come to the police station and also called a girl and asked her to write to him. The

petitioner then asked the lieutenant if he could wait for his grandmother in the lieutenant's office.

Shortly after noon the petitioner's grandmother arrived at police headquarters and spoke with the petitioner. As the grandmother was leaving and in the presence of Lieutenant Fabrizi and Sergeant Frank Nerkowski she advised the petitioner to tell the truth and asked the petitioner why he had gone there and the petitioner replied to her in the presence of the two officers that they had gone there to mug a man and he is dead. The petitioner then advised Lieutenant Fabrizi that he would describe his version of what happened and gave a detailed description of following the victim into the apartment and mugging him but leaving him unconscious on the floor and leaving; that immediately thereafter his companion left him and reappeared shortly thereafter and handed him a towel, a bloody knife, a wristwatch and a ten dollar bill; and finally a description of leaving the area with Robert Womble and Raeford Willis.

At approximately 1:35 P.M. on May 16, 1967 the petitioner was taken to the Second Circuit Court where he was arraigned at approximately 1:45 P.M.

The petitioner was subsequently indicted by a Grand Jury for the crime of murder in the first degree. In accordance with Connecticut practice the petitioner was present throughout the grand jury proceedings without counsel. No recorded stenographic transcript was made of the grand jury proceedings. There was no motion or request by the petitioner's attorney either that he be allowed to attend and participate in the grand jury proceedings or that stenographic minutes be kept of the proceedings.

Thereafter the petitioner pleaded not guilty to the Indictment and was tried by a jury of twelve and on April 26, 1968 after a full trial the jury returned a verdict of Guilty of First Degree Murder and on April 29, 1968 the

same jury recommended a sentence of life imprisonment which was imposed by the Court.

The petitioner's subsequent appeal to the Connecticut Supreme Court was denied by that court on April 3, 1973, reported at 164 Conn. 402, 324 A.2d 234 and an application for certiorari was denied by the United States Supreme Court on October 9, 1973, being reported at 414 U.S. 861, 38 L.Ed.2d 112, 94 S.Ct. 77.

II

The respondent disagrees with the contents of the Statement of the Case in the petitioner's brief in five respects: 1) the respondent in no way accedes to the petitioner's characterization of his statements at the Bridgeport police station as being the product of an "interrogation" or "session of questioning" as hereinafter discussed; 2) the neglect of the petitioner to disclose in his brief that he had made substantial admissions of his involvement and guilt long before he ever mentioned a lawyer as hereinafter mentioned; 3) the petitioner's failure to disclose that prior to his indictment for this crime he never requested or moved for a transcript of the Grand Jury proceedings to be made or for permission for his counsel to attend and participate in such proceedings; 4) the representation that a defendant is prohibited from taking notes during the Grand Jury proceeding is blatantly untrue; and 5) Counsel's repeated recitations that petitioner on the date of his arrest "asked to see a lawyer and none was provided prior to the statements in question" and that he made "a request for counsel" are patently unfair in that they obviously convey the impression that petitioner made a request to have an attorney provided to him which is clearly and absolutely not factual.

ARGUMENT

I. The Grand Jury Proceedings

A. Right to Counsel

As conceded by the petitioner the great majority of jurisdictions respect closely the secrecy of the grand jury proceeding and deny the defendant permission to attend or participate in that proceeding. In Connecticut neither the judge nor the state's attorney participates in the presentation or reception of evidence. By allowing the defendant to attend and participate in the proceeding Connecticut is in fact allowing the defendant substantially more latitude than other jurisdictions.

The long established authority and precedent in Connecticut unanimously hold that "neither precedent nor the due administration of justice require that counsel be present with the defendant at the grand jury proceeding." *State* v. *Stallings,* 154 Conn. 272, 282, 224 A.2d 718.

This holding was restated in the case of *State* v. *Delgado,* 161 Conn. 536, 539, 290 A.2d 338, and *State* v. *Vennard,* 159 Conn. 385, 390, 270 A.2d 837, cert. denied 400 U.S. 1011, 91 S.Ct. 576, 27 L.Ed.2d 625.

Similarly recent Federal decisions have also repeated this holding that clearly ". . . there is no constitutional right to be represented by counsel while the grand jury is deliberating." *Harris* v. *Beto,* 438 F.2d 116; *Hammond* v. *Brown,* 323 F.Supp. 326.

> "An accused counsel likewise has no right to be present at the grand jury." 8 Am Jur 2d 989N (Grand Jury § 34)

The petitioner's present claims that either constitutional rights or decisions of the Supreme Court should entitle him to the presence of counsel at the grand jury proceed-

ing have been repeatedly denied by well reasoned decisions of the Federal court system. *United States* v. *Duncan,* 456 F.2d 1401, 1407; *In Re Grumbles,* 453 F.2d 119, 122; *United States* v. *Corallo,* 413 F.2d 1306, 1330; *United States* v. *George,* 444 F.2d 310, 314; *United States* v. *Wolfson,* 282 F.Supp. 772, 775; *Gollaher* v. *United States,* 419 F.2d 520, 523-524.

> "The grand jury is an ancient institution and the only agency of our jurisprudence that is secretive. Its proceedings are not adversary. Its function is only investigative. It does not determine guilt or innocence. It determines only whether there is sufficient evidence to cause an accused to stand trial before a petit jury. There is no right of an accused to cross-examine witnesses or to introduce evidence in rebuttal. The grand jury has in all ages stood between the accused and his unjust accusers. One accused of crime may oftentimes, by himself testifying before the grand jury, clear up the charges against him so that no indictment is returned.
> . . . Admittedly Escobedo, Miranda and Wade are not factually analogous to Strang's position in the case at bar. We are unwilling to extend the principle of those cases to the right of a potential defendant to have a lawyer present with him in the grand jury room." United States v. Levinson, 405 F.2d 971, 980.
>
> "It is hornbook law that witnesses called to testify before a grand jury have no right to the presence of a lawyer to object to questions or act as counsel." United States v. Corallo, ante at 1330.

The State respectfully submits that these numerous federal decisions and the decisions of the Connecticut Supreme Court retain their vitality and urge upon this Court the total lack of any reported decision supporting the petitioner's claim.

Clearly, the grand jury is not an adversary proceeding, but an investigative and accusatory body whose function is to determine probable cause for prosecution. *United States* v. *Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561; *Costello* v. *United States,* 350 U.S. 359, 76 S.C. 366, 100 L.Ed. 395. *Hammond* v. *Brown,* 323 F.S. 326, 338, affirmed 450 F.2d 480; *State* v. *Williams,* La., 310 So.2d 528, 533.

> "A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an ex parte investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." United States v. Calandra, ante at 343, 344.
>
> "Proceedings of the grand jury are not a trial but are more in the nature of an inquest. There are no parties, and no defendant has a right to appear before the grand jury; and, if he does appear, it is only upon permission granted and he then appears as a witness, not a defendant, and he has no right to take his attorney along with him." Wickline v. Alvis, (Ohio) 144 N.E.2d 207, 210, 211.
>
> "Since the grand jury 'only acts as the formal and constitutional accuser of crime' and since it 'does not exercise a judicial function,' it is fundamental that grand jury proceedings are non-adversary." Hammond v. Brown, ante at 338.
>
> "Defendant also argues that he should have had counsel present at the grand jury proceedings because the investigation had turned to the accusatory stage. . . . It (the grand jury) is not an adversary proceeding, but an investigative and accusatory body whose function is to determine probable cause for prosecution." State v. Williams, ante at 533.

Quite clearly, the established authority as recited herein is that a grand jury proceeding is not an adversary pro-

ceeding and there exists absolutely no authority or precedent that an accused person has a constitutional right to representation by counsel at the grand jury.

B. Right to Stenographic Minutes

The petitioner's position on the absence of a transcript of the proceedings before the grand jury apparently is that provisions of the Constitution of the United States require that such a transcript be prepared. Necessarily this is contrary to the well established authority both of the State and the Federal judicial decisions.

> "There is no constitutional or statutory right to have a stenographer present in the grand jury and we find no error in the refusal of the trial court to permit it in this case." State v. Delgado, 161 Conn. 536, 540, 290 A.2d 338. Accord: State v. Vennard, 159 Conn. 385, 390, 270 A.2d 837.
>
> "The law does not require that the testimony of witnesses before a grand jury be recorded or transcribed. . . . Every court that has considered the question has so held (citations omitted)" Loux v. United States, 389 F.2d 911, 916.
>
> ". . . neither statute nor the Constitution requires that the testimony of witnesses before a grand jury be recorded or transcribed." United States v. Harflinger, 436 F.2d 928, 935.
>
> "We find no constitutional right to have grand jury proceedings recorded." United States v. Harflinger, ante, at 936.

Quite clearly, the reported federal decisions unanimously hold that there is no constitutional requirement that grand jury proceedings must be recorded or transcribed. *United States* v. *Biondo,* 483 F.2d 635, 641; *United States* v. *Antonick,* 481 F.2d 935; 937; *United States* v. *Hartlerode,* 467 F.2d 1280, 1282; *United States* v.

Cooper, 434 F.2d 648; *United States* v. *Schrenzel,* 462 F.2d 765; *United States* v. *Hedges,* 458 F.2d 188; *United States* v. *Kind,* 433 F.2d 339, 340; *United States* v. *Harper,* 432 F.2d 100, 102; *United States* v. *Ybarra,* 430 F.2d 1230, 1233; *United States* v. *Wilson,* 427 F.2d 649, 659; *Reyes* v. *United States,* 417 F.2d 916, 918; *Baker* v. *United States,* 412 F.2d 1069, 1073; *United State* v. *Caruso,* 358 F.2d 184; *United States* v. *Cianchetti,* 315 F.2d 584.

The refusal to reverse a valid conviction because of the failure to transcribe the grand jury proceeding was followed in the Second Circuit in the cases of *United States* v. *Cramer,* 447 F.2d 210, 213 and *United States* v. *Ayers,* 426 F.2d 524, 529.

The position and claims of the petitioner and his counsel are eloquent and elaborate *but completely unsupported by any reported decision of any federal or state court of record.*

> ". . . a defendant is not entitled to a reversal of his conviction simply because testimony before the grand jury which returned an indictment against him has not been recorded. *This is the position taken by every court which has considered the problem.*" (Emphasis in original) United States v. Antonick, ante, at 937. United States v. Cramer, ante, at 213.

II. Composition of the Grand Jury

The respondent initially disputes the completely unsubstantiated statements within the petitioner's brief that the grand jury which indicted the petitioner was composed exclusively of personal acquaintances of the sheriff or his associates; that residents of the City of Bridgeport were completely excluded from service on the petitioner's grand jury; and that the grand jury which indicted the petitioner was the same grand jury which indicted one Villafane in another unrelated matter.

In fact the 18 member grand jury which indicted the petitioner consisted of people of different religious persuasions and both the black and white races; the members were from different communities within Fairfield County and included six Bridgeport residents and only one single person who served on the unrelated Villafane jury; and there was just no evidence that the 18 member panel was composed of personal acquaintances of the sheriff. The trial court which heard the testimony of Sheriff John Previdi was satisfied and specifically found that in the selection of the grand jury which indicted the defendant there was absolutely no systematic exclusion of any electors or group of electors.

Further the petitioner's reference to the use of volunteers must be considered exclusively in the context of persons who agreed to serve voluntarily on the grand jury as distinguished from individuals who themselves requested service.

The only statutory regulation regarding grand jury service in Connecticut is that the individual be an elector (C.G.S. 54-45). The general statutes prescribe no additional limitations or qualifications nor any method for selection. It appears undisputed that by longstanding tradition the Superior Court has always directed the High Sheriff of the particular county to convene a grand jury and the sheriff complies with that direction.

The law applicable to the constitutionality of grand jury composition is clear. A grand jury which returns an indictment will not be found to have been improperly selected where no proof is offered that any class was excluded or that the grand jury was not legally drawn from a representative cross-section of the community. *Butler* v. *United States,* 402 F.2d 748; *U.S.* v. *Butera,* 420 F.2d 564, 574.

The State submits that the constitutional test, ". . . is not whether a particular method of selection, such as voter registration lists was employed but whether the use of such

a procedure resulted in an array which was a representative cross-section of the community or an array from which a cognizable group or class of qualified citizens has been systematically excluded (citations omitted)". *United States* v. *Tropiano* (2nd Circ.), 418 F.2d 1069, 1079.

The respondent respectfully submits that the petitioner has not in any way established that members of any distinguishable group were excluded from the grand jury and on the contrary the evidence established exactly the opposite. The obvious purpose and justification for requiring that a grand jury include a cross-section of the community is that persons of all races, ethnic backgrounds, employment and sex can make some individual contribution to the jury which is necessarily lacking when they are excluded, even if what they have to offer cannot be articulated. Cf. *Dumont* v. *Estelle,* 377 F.Supp. 374. People's attitudes may well vary or differ to some degree along lines of race, age, sex, extent of education or employment and such areas may well be the basis for the nucleus of a cognizable group or class of citizens who may not be systematically excluded from jury participation. *Quadra* v. *Superior Court of the City and County of San Francisco,* 378 F.Supp. 605, 620, 621.

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." Peters v. Kliff, 407 U.S. 493, 503, 504, 92 S.Ct. 2163, 33 L.Ed.2d 83.

The petitioner, however, has in no way established the existence of any such definable or cognizable group applicable to his own indictment.

> "When the makeup of the excluded group of persons is in all other respects substantially identical to and therefore adequately represented by those who remain in the grand jury pool, there is no prejudice to the petitioner. The 'qualities of human nature and varieties of human experience' possessed by freeholders and householders taken as a whole were substantially identical to those characteristics possessed by nonhouseholders and nonfreeholders. Although exclusion of nonhouseholders and nonfreeholders may have on its face offended due process of law, the petitioner validly convicted by a petit jury was not prejudiced." *Dumont* v. *Estelle,* ante at 385.

The State again submits that it is not the *method of selection* but the *result* of that selection which is determinative. Without question grand juries must be selected from all classes of persons without discrimination because of race, color or religion or political belief and any discrimination on the part of selecting officials is a violation of constitutional guarantees. 38 Am Jur 949 (Grand Jury § 4)

In brief it is again the position of the State that there exists no authority, precedent or statute requiring a random selection of grand jurors and that the only constitutional requirements are an affirmative duty that the juries include a representative cross-section of the community and a negative duty that no class or group is purposely excluded from participation. Cf. *United States* v. *Tillman,* 272 F.Supp. 908, 910.

> "Nobody contends that to obtain a 'cross-section' it would be required that names be taken at random from the totality of the inhabitants of the area . . ." Chance v. United States, 322 F.2d 201, 204; United States v. Tillman, 272 F.Supp. 908, 913. See also State v. Villafane, 164 Conn. 637, 644, 325 A.2d 251.

"Quite clearly obtaining a cross-section of the community does not require that the jury be a 'perfect mirror of the community or accurately reflect the proportioned strength of every identifiable group.' Swain v. Alabama, 380 U.S. supra, at page 208, 85 S.Ct. 824 at page 829. Accord: Hernandez v. Texas, 347 U.S. supra, page 482, 74 S.Ct. 667; Casseli v. Texas, 339 U.S. supra, page 287, 70 S.Ct. 629; Akins v. Texas, 325 U.S. supra, page 403, 65 S.Ct. 1276; Martin v. Texas, 200 U.S. 316, 321, 26 S.Ct. 338, 50 L.Ed. 497." Commonwealth v. Carroll (Pa.) 278 A.2d 898, 900.

In a very recent 1971 decision the Supreme Court of the State of Nevada reviewed and sustained a grand jury selection procedure strikingly similar to the Connecticut procedure, quoting the following language: "We do not think that persons who are unacquainted with the selection officials constitute a distinct class, against whom discrimination can occur"; Application of Robarts (Nev.) 485 P.2d 685, 686.

Finally the respondent refers to the recent decision of this court in the case of *United States ex rel. Chestnut* v. *Criminal Court of the City of New York*, 442 F.2d 611 in which the court refused to reverse an indictment where the grand jury panel consisted exclusively of volunteers, exclusively between the ages of 35 and 65 and with all welfare recipients summarily excluded.

The respondent emphatically submits that there exists not one shred of evidence that the selection methods of Sheriff John Previdi did not produce fair and impartial grand jurors drawn from a representative cross-section of the community.

III. Composition of the Petit Jury Panel

The total petit jury panel for Fairfield County for the court year in question contained approximately 12,000 names. From among these 12,000 prospective jurors the evidence presented established that some totally undetermined speculative amount of possible prospective jurors may have been eliminated in error. Absolutely no specific evidence as to the elimination of any single eligible prospective juror was presented. The evidence presented by the petitioner in his challenge to the jury array was totally vague and uncertain and at best indicated that some insignificant deviations from the statutory requirement of selection of prospective jurors by lot may have existed. Quite clearly absolutely not one specific figure or mathematical proportion was established.

The petitioner's selection was directed at the procedure followed in only six of the twenty-three towns within Fairfield County, and the conclusion is irresistible that the procedures followed in the other communities were completely proper and the presumption that the persons in charge of jury selection have completed their obligation properly is completely applicable. 50 C.J.S. 889 (Juries § 163a).

While the defendant would group the apparent deviations together in a manner which would magnify them and attempt to attribute all of them to all of the towns such is simply not the accurate situation. Quite obviously whatever scattered deviations or technical irregularities were presented were *de minimis* within the 12,000 total names submitted.

The respondent vigorously disputes the language of petitioner's brief which would insinuate some significant exclusion of some significant portion of the community from the jury array. Despite the petitioner's eloquent presentation of his claim there remains absolutely no proof of anything

even approaching significance. The petitioner's evidence disclosed, at best, sporadic instances of an occasional isolated exclusion of some individual. The respondent submits that not one iota of evidence was submitted that the 12,000 prospective jurors were not selected by lot as now claimed in the petitioner's brief.

The law applicable to these situations is quite clear:

> "Statutory provisions with regard to making up the jury list ordinarily are held to be merely directory, and errors and irregularities in failing strictly to comply with the provisions which are not prejudicial to the parties do not invalidate the list or furnish any ground for challenging the array." 50 C.J.S. 889 (Juries § 163b) citing 51 cases.

A situation virtually identical with the petitioner's instant complaints was presented to the Fifth Circuit Court in the recent case of *Bradley* v. *State of Texas*, 470 F.2d 785, in which a convicted murderess also complained by federal habeas corpus that state jury commissioners had made certain technical violations in the erroneous exclusion of certain women with children in derrogation of the appropriate state statutes. The court summarily dismissed this technical claim:

> "If it is true that the jury commissioners excluded women with children under the age of eighteen, rather than sixteen, then they may have excluded a group larger than that specified by the Texas statutes. But whether the jury commissioners complied with the letter of Texas law in their choice of veniremen is a different question from whether their error, if any, assumed constitutional magnitude. There is nothing to suggest that women with children between the ages of sixteen and eighteen—or, for that matter, women with children under sixteen—constitute a recognizable class against whom discrimination in jury selection is

prohibited. Surely appellant would not argue that community prejudices manifest a recognition of these groups as distinct classes, see Hernandez, supra; and she has not attempted to show that women with school-age children are a group whose exclusion 'will deprive the jury of a perspective on human experience' without which appellant could not be fairly tried. Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972)." *Bradley* v. *State of Texas,* ante, at 789.

"Failure to comply with state procedures (in jury selection) does not necessarily produce an unconstitutional exclusion." Bokulich v. Jury Commission, 298 F.Supp. 181, 192.

". . . not every omission of potentially qualified jurors is an error of constitutional proportions." United States v. Resnick, 483 F.2d 354, cert. den. 414 U.S. 1008, 94 S.Ct. 370, 38 L.Ed.2d 246.

". . . the general rule is that statutory provisions respecting the preparation of lists and the drawing of the panel are regarded as directory only, and that irregularities therein are no ground of challenge, unless they are such as plainly operated to prejudice the challenging party." State v. Biehl, 135 N.J. Law 268, 51 A.2d 554, 556.

"The remainder of the cited cases are illustrative of the rule that an indictment by a grand jury or a verdict by a petit jury will not be invalidated because of some technical irregularity in the making up of a jury list unless prejudice be shown to result thereby." State v. Goyet, 119 Vt. 167, 122 A.2d 862, 867.

"As a general rule, errors and irregularities in failing to comply strictly with the statutes in making up a jury list, when there is no resultant prejudice to the parties involved in litigation, does not invalidate the list." People v. Hess, 104 Cal. App. 2d 642, 234 P.2d 65, 83, App. dism. 342 U.S. 880, 72 S.Ct. 177, 96 L.Ed. 661.

"While all of these represent unexcused variations from the jury selection procedure set out by the legislature . . . we believe that they are not material deviations and did not in any way prejudice defendant or deprive him of a fair and impartial jury trial." State v. Mastrian, 285 Minn. 51, 171 N.W. 2d 695, 704, cert. den. 397 U.S. 1049, 9 S.Ct. 1381, 25 L.Ed. 2d 662.

"It is well settled that mere irregularities in the drawing of grand and petit jurors, is not a ground for reversing a conviction, unless it appears that they operated to the injury or prejudice of the prisoner." People v. Kruger, 302 N.Y. 447, 99 N.E.2d 233, 235.

"A judgment of conviction will not be reversed for disregarding formal provisions of the law regarding the manner and selection of juries if a fair and impartial jury was secured. (citations omitted) Defendant offered no showing that his rights were prejudiced due to this technical discrepancy." State v. McGee, (Ariz.) 370 P.2d 261, 266.

"The statutes dealing with the selection of jurors have been held to be directory and error predicated thereor will not be reviewed after verdict unless it is apparent the accused was prejudiced thereby." State v. Hankish, 147 W.Va. 123, 126 S.E. 2d 42, 45.

This same rule has been recited by the Connecticut Supreme Court on at least two separate occasions in the cases of *State* v. *Chapman,* 103 Conn. 453, 130 A.899 and *State* v. *Ferraro,* 146 Conn. 59, 62, 147 A.2d 478.

". . . mere irregularities in the drawing of grand and petit jurors, is not a ground for reversing a conviction, unless it appears that they operated to the injury or prejudice of the prisoner." State v. Chapman, ante, at 472.

"We have held on a number of occasions that irregularities in drawing or summoning a jury did not constitute a ground for a new trial unless they were

actually or probably prejudicial to a party." State v. Ferraro, ante, at 62.

In *Swain* v. *Alabama,* 380 U.S. 202, 207, 85 S.Ct. 824, 13 L.Ed. 759 the failure of the state jury commissioners to follow statutory regulations was insufficient to dismiss a jury array in the absence of evidence of fraud or purposeful discrimination.

Finally the case of *United States* v. *Silverman,* 449 F.2d 1341, involved the inclusion of a clearly ineligible juror on the actual twelve member jury which convicted the defendant. In refusing to reverse the conviction this Court speaking by Judge Paul Hays stated: "the inclusion in the panel of a disqualified juror does not require reversal of a conviction unless there is a showing of actual prejudice." *United States* v. *Silverman, ante* at 1344.

In his brief the defendant makes no claim, allusion or reference to being prejudiced by the compilation of the names of 12,000 potential jurors, quite clearly because it was just not so.

Clearly and without doubt the defendant is hoping that lightning will strike and enable him to reverse his conviction on a technicality having absolutely no relation to that conviction.

A recent decision of the Supreme Court of the State of Washington appears uniquely applicable to the instant factual situation:

> "The manner of making up the jury lists indicated by the statute is merely directory, and need be only substantially complied with, to the end that a fair and impartial trial may be had. * * * [I]n this state we have followed the great weight of authority, to the effect that such statutes are directory, and that the very fact that the officer in the performance of his duty failed to conform precisely to the statutory re-

quirements did not invalidate his act unless it appears that there is reasonable apprehension that the complaining party has been prejudiced. The purpose of all these statutes is to provide a fair and impartial jury, and if that end has been attained and the litigant has had the benefit of such a jury, it ought not to be held that the whole proceeding must be annulled because of some slight irregularity * * *.

"Having determined that a fair and impartial jury was secured, we hold that * * * *if the prisoner has been tried by an impartial jury, it would be nonsense to grant a new trial * * * in order that he might be again tried by another impartial jury.*" State v. Finlayson (Wash.) 417 P.2d 624, 626 (emphasis added)

In Connecticut a challenge to the array will be allowed only on some ground which arises out of the proceedings in selecting and summoning the panel. *State* v. *Smith,* 138 Conn. 196, 202, 82 A.2d 816. In *State* v. *McGee,* 80 Conn. 614, 619, 69 A. 1059, the challenge to the array was allowed because the failure to follow the statutory command in selecting names was applicable to all the names selected and thus applied to the entire panel. "A challenge to the array of jurors is an objection to the whole panel of jurors at once, and in order to be available it must be for a cause that affects all the jurors alike." *State* v. *Hogan,* 67 Conn. 581, 583, 35 A. 508; *State* v. *Smith, supra; State* v. *Rocco,* 109 Conn. 571, 572, 145 A. 47; *State* v. *Luria,* 100 Conn. 207, 209, 123 A. 378; 47 Am. Jur. 2d, Jury § 224; 5 Wharton, Criminal Law and Procedure § 1961. As the petitioner's challenge applied only to the doings of jury committees in six of twenty-three towns, it was inadequate on its face. It clearly did not claim a deficiency in the selection process used to obtain the jurors from seventeen towns and thus did not attack the validity of the entire panel. *State* v. *Hogan, supra.*

The respondent again reiterates that the petitioner's brief contains numerous statements which necessarily in-

fer or imply that he has established some significant exclusion of some significant recognizable group of potential jurors when such is simply not the fact. The record at best reflects only occasional technical errors which in absolutely no manner amount to a group whose exclusion would deprive the petitioner of an appropriate array or a fair trial.

IV. The Petitioner's Statements

The petitioner's brief while lengthy in other respects neglects any time chronology of the detailed events of May 16, 1967, the date of his arrest, and his description of pertinent facts seems to include only selected items stated in a manner favorable to his claims while at the same time omitting other vital items not so favorable. Initially it appears undisputed that the petitioner was in no way abused in any manner on that date.

The petitioner was arrested at approximately 9:20 a.m. at the State Jail. At this time he was advised of the nature of the charge and the name of the victim as well as his right to remain silent; the fact that anything he said could be used against him in court; his right to an attorney; and the fact that if he could not afford an attorney the State would provide one for him before any questioning. The petitioner had been arrested on four or five prior occasions and had been advised of his constitutional rights on prior occasions. The petitioner had been advised of these rights on prior occasions by police officers. He had also been advised of these rights on prior occasions by court judges. The prior criminal experience of a defendant may be used to help establish that constitutional warnings were understood because they had been received before in other cases and at other times. *State* v. *Collins* (Wash.), 446 P.2d 325, 327; *Thessen* v. *State* (Alaska), 454 P.2d 341, 351; *People* v. *Pierce,* 67 Cal. Rep. 438, 441; *Nash* v.

State (Texas), 477 S.W.2d 557; *People* v. *Higgins*, 50 Ill. 2d 221, 278 N.E.2d 68, 71; *Mingo* v. *People* (Col.), 468 P.2d 849, 852; *State* v. *Devoe* (Mo.), 430 S.W.2d 164, 167; *Heard* v. *State*, 244 Ark. 44, 424 S.W.2d 179, 181.

The record discloses that in an auto on the way to the police station the petitioner stated: "I didn't kill the man in the hotel."

After being advised that he was charged with the murder of the man in the Green Apartments the petitioner stated: "Oh, that's different. Now I know what you are talking about."

Quite clearly and not by the wildest stretch of the imagination was the petitioner being interrogated when he made those initial statements. An almost identical situation was judicially approved in the recent decision of *State* v. *Arnold* (Oregon), 492 P.2d 919.

Inside the police station the petitioner was readvised of the same constitutional rights and the usual Bridgeport police department's written constitutional rights form was read and executed by him.[1]

At that time he was also asked if he understood the rights form and answered yes and then signed it. After the petitioner signed the form he was further advised by Bridgeport Police Lieutenant Fabrizi that he (the petitioner) did not have to make any statement because the police already had everything they required regarding the murder, and related their information of his involvement within the apartment of the deceased. When the lieutenant mentioned removing the fingerprints from the refrigerator the petitioner stated: "I didn't do that, the other man did."

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[1] At the non-jury hearing on the admissibility of his statements the petitioner testified under oath that it was not his signature on the notifications of rights form and that the signature was a forgery. During the trial the defendant admitted under oath that the signature was his and was not a forgery.

Again at the time of this admission the petitioner had not been asked one single question and clearly was not the subject of the "secret interrogation process." cf. *Miranda* v. *Arizona,* 384 U.S. 436, 467, 86 S.Ct. 1602, 16 L.Ed. 2d 694.

Again as the petitioner offered his initial description of the assault upon Batista Carbone the record does not reflect a single question being propounded to him but an additional admonition from the lieutenant not to volunteer any information.

Following his initial admission to being in the Carbone apartment and assaulting the gentleman the petitioner was processed for normal booking procedures and Lieutenant Fabrizi directed his attention to other detective bureau matters not associated with the petitioner. At approximately 11:30 a.m. the petitioner requested permission to call his grandmother and indicated a desire to call his lawyer.[2] At that time it again appears that he was given a telephone and advised by the officers that he could call anyone he wished and again advised that he did have to tell anything to the police.

The most recent decision of *U.S.* v. *Brown,* 457 F.2d 731, involved a defendant's conversation with police officers under circumstances strikingly similar to the Cobbs situation and although the suspect made three unsuccessful attempts to reach his attorney by telephone his conversation was completely admissible and constitutional with the court holding that an unsuccessful attempt to reach an attorney did not indicate a desire to remain silent and the police

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[2] Lieutenant Fabrizi testified specifically on three occasions that the petitioner's words were "I should talk to my lawyer." At that time he was offered unlimited use of the telephone. Sergeant Nerkowski who had been present in the room had no particular recollection of the petitioner's comment. The petitioner's brief includes only one isolated portion of the testimony of Sergeant Nerkowski to the effect that the petitioner mentioned something about wanting to see a lawyer.

should not have construed it as such. See also *United States* v. *Hopkins*, 433 F.2d 1041, and *Redepenning* v. *State* (Wis.), 210 N.W.2d 673.

Between 11:00 a.m. and 11:30 a.m. the petitioner telephoned his grandmother at her place of employment and in the presence of the police officers advised her that he was arrested and requested her to come to the police station. The petitioner also placed several calls to the Beardsley Terrace Apartments seeking a girl named Jackie Scales. At that time the petitioner asked Lieutenant Fabrizi if he could wait for his grandmother in the lieutenant's office and the lieutenant agreed. The lieutenant continually engaged himself in other police business with other officers and again there was absolutely nothing even remotely close to interrogation of the petitioner with the only conversation reflected by the record during the period being the petitioner's questions to Lieutenant Fabrizi asking how he knew so much and the lieutenant's answers that he (Lieutenant Fabrizi) was not asking him (the petitioner) any questions and he should not ask the lieutenant any. Again it clearly appears that this was just not the "interrogation process". Cf. *Miranda* v. *Arizona, ante,* at 469.

The petitioner's grandmother arrived shortly after noon and spoke with the petitioner in an interview room.

As the petitioner and his grandmother were leaving the interview room and in the obvious presence of the officers the grandmother told the petitioner, "I know you don't believe in God, but you should tell the truth. You had no business going there. Why did you go there?"

At that time the petitioner in the presence of the officers replied to the grandmother, "We went there to mug a man, and he is dead or he is killed." Again the statement was just not any part of the police interrogation encompassed by *Miranda*. Quite clearly admissions made by a defend-

ant during a conversation with a relative or friend are clearly not the product of an interrogation within the purview of the *Miranda* decision. *Soolook* v. *State* (Alaska), 447 P.2d 55, 60; *State* v. *Peck* (Mo.), 429 S.W.2d 247, 251; *Edgington* v. *State,* 243 Ark. 10, 418 S.W.2d 637, 638; *State* v. *Chaplin* (Maine), 286 A.2d 325, 333 (reversed on other grounds); *Gallegos* v. *State* (Nevada), 446 P.2d 656, 657.

At that time and again without question or interrogation the petitioner stated to Lieutenant Fabrizi: "I will tell you what went down." He proceeded to voluntarily relate his version of the events which occurred on the evening of August 27, 1966 again without interrogation or significant question.

The State concedes that all statements uttered by the petitioner on May 16, 1967 were made while he was in police custody but at the same time it emphatically denies that any individual statement or comment was the result of the "police interrogation process."

Clearly statements which are not made in response to questioning initiated by law enforcement agents are admissible even without any *Miranda* warnings. *Miranda* v. *Arizona, ante* at 478; *United States* v. *Wolff,* 409 F.2d 413, 417, certiorari denied 396 U.S. 858, 90 S.Ct. 124, 24 L.Ed.2d 108; *United States* v. *Angello,* 452 F.2d 1135, 1139; *United States* v. *Bekowies,* 432 F.2d 8, 11 (reversed on other grounds); *State* v. *Miller,* 35 Wis. 2d 454, 151 N.W.2d 157, 164.

See also *United States* v. *Henderson,* 469 F.2d 1074, where the court accepted statements made by an accused who had not even received the complete *Miranda* warnings but who volunteered information and continued to answer after being merely advised, "You know you don't have to answer any of my questions."

In *United States* v. *Barone,* 467 F.2d 247, this Court admitted statements made by the interrogation of a prop-

erly advised accused made after a telephone conversation with his attorney.

In *United States* v. *Anthony,* 474 F.2d 770, the Court sustained statements by an accused who actually initially stated that he wanted an attorney present and thereafter like the present petitioner, himself initiated subsequent conversation in which he made admissions.

See also *United States* v. *Cavallino,* 498 F.2d 1200, involving a factual situation greatly similar to the instant situation and where a fully-advised accused who initially stated that he wanted to talk to an attorney, subsequently held a private discussion with a relative, and then voluntarily confessed to several criminal offenses.

In *United States* v. *Hodge,* 487 F.2d 1945, an accused having first actually requested to see an attorney as compared to the vague language in the instant matter subsequently changed his mind and made a statement later used as evidence against him.

In *United States* v. *Kaylor,* 491 F.2d 1127, this Court acknowledged the admissibility of volunteered statements made by an accused after a previous request for counsel.

The State emphatically submits that the defendant's total failure to brief the details of the defendant's admissions is a knowing calculated effort to avoid them, and urges this court that the defendant "was no inexperienced youth, unknowing in the ways of the world, nor a stranger to the technique of a police interrogation." *State* v. *Collins, ante,* at 327.

Quite clearly the defendant volunteered his comments without any interrogation whatsoever.

> "Under Miranda, however, statements volunteered by a defendant, even though in custody, free from interrogation or other coercion, are still admissible regardless of the absence of warnings of rights.

Miranda, 384 U.S. at 478, 86 S.Ct. 1602." *Klampert* v. *Culp*, 437 F.2d 1153, 1154.

"Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he can talk to the police without the benefit of warnings and counsel, but whether he can be *interrogated* . . . *Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*" *Miranda* v. *Arizona*, *ante*, at 478 (emphasis added).

CONCLUSION

The respondent respectfully submits that the order of the District Court denying the petition for habeas corpus should be affirmed.

Respectfully submitted,

DONALD A. BROWNE,
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Attorney for Respondent-Appellee.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES L. COBBS,

Petitioner-Appellant,

vs.

CARL ROBINSON, Warden, Connecticut State Prison,

Respondent-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 26th day of September, 1975, he served two copies of the Brief for Respondent-Appellee on

Bernard Green, Esq.

the attorney for the Petitioner-Appellant by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. 64 Lyon Terrace, Bridgeport, Conn. ( ) ~~NXY~~., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
26th day of September, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976